

VIRGINIA ACTS OF ASSEMBLY -- 2010 SESSION

CHAPTER 409

An Act to amend the Code of Virginia by adding in Title 55 a chapter numbered 27.1, consisting of sections numbered 55-525.1 through 55-525.7, relating to exchange facilitators.

[H 417]

Approved April 11, 2010

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 55 a chapter numbered 27.1, consisting of sections numbered 55-525.1 through 55-525.7, as follows:

CHAPTER 27.1.

EXCHANGE FACILITATORS ACT.

§ 55-525.1. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Affiliated with" means that a person directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with the other specified person.

"Commingle" means to mix together exchange funds with operating and other nonexchange funds belonging to or under control of the exchange facilitator in such a manner that a client's exchange funds cannot be distinguished from operating or other nonexchange funds belonging to or under control of the exchange facilitator.

"Exchange Accommodation Titleholder" or "EAT" has the same meaning ascribed thereto in IRS Revenue Procedure 2000-37.

"Exchange client" means the taxpayer with whom the exchange facilitator enters into an agreement described in subdivision 1 of the definition of exchange facilitator.

"Exchange facilitator" means a person that:

1. For a fee facilitates an exchange of like-kind property by entering into an agreement with a taxpayer:

a. By which the exchange facilitator acquires from said taxpayer the contractual rights to sell said taxpayer's relinquished property located in the Commonwealth and transfer a replacement property to said taxpayer as a qualified intermediary as that term is defined under Treasury Regulation § 1.1031(k)-1(g)(4);

b. To take title to a property located in the Commonwealth as an Exchange Accommodation Titleholder; or

c. To act as a qualified trustee or qualified escrow holder as those terms are defined under Treasury Regulation § 1.1031(k)-1(g)(3), except as otherwise provided in this definition; or

2. Maintains an office in the Commonwealth for the purpose of soliciting business as an exchange facilitator.

"Exchange facilitator" shall not include (i) the taxpayer or disqualified person as that term is defined under Treasury Regulation § 1.1031(k)-1(k) seeking to qualify for the nonrecognition provisions of Internal Revenue Code § 1031; (ii) any financial institution as defined herein or any title insurance company, underwritten title company, or escrow company that is merely acting as a depository for exchange funds or that is acting solely as a qualified escrow holder or qualified trustee as those terms are defined under Treasury Regulation § 1.1031(k)-1(g)(3), and is not otherwise facilitating exchanges as defined herein; (iii) a person who advertises for and teaches seminars or classes or otherwise gives presentations to attorneys, accountants, real estate professionals, tax professionals, or other professionals where the primary purpose is to teach the professionals about tax deferred exchanges or train them to act as exchange facilitators; or (iv) an entity that is wholly owned by an exchange facilitator or that is wholly owned by the same person as the exchange facilitator and is used by such entity to facilitate exchanges or to take title to property in the Commonwealth as an EAT.

"Exchange funds" means the funds received by the exchange facilitator from or on behalf of the exchange client for the purpose of facilitating an exchange of like-kind property.

"Fee" means, for purposes of subdivision 1 of the definition of exchange facilitator, compensation of any nature, direct or indirect, monetary or in-kind, that is received by a person or a related person as described in Internal Revenue Code § 267(b) or 707(b) for any services relating to or incidental to the exchange of like-kind property under Internal Revenue Code § 1031.

"Financial institution" means any bank, credit union, savings and loan association, savings bank, or trust company chartered under the laws of the Commonwealth or the United States whose accounts are insured by the full faith and credit of the United States of America, the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or other similar or successor programs and any direct or indirect subsidiary of such bank, credit union, savings and loan association, savings

bank, or trust company.

"Person" means, in addition to the singular, persons, groups of persons, cooperative associations, limited liability companies, firms, partnerships, corporations, or other legal entities and includes the agents and employees of any such person.

§ 55-525.2. Change in control.

An exchange facilitator shall notify all existing exchange clients whose relinquished property is located in the Commonwealth, or whose replacement property held under a Qualified Exchange Accommodation Agreement is located in the Commonwealth, of any change in control of the exchange facilitator. Such notification shall be made to the exchange facilitator's clients within 10 business days following the effective date of such change in control either by facsimile or email transmission, or by first class mail, and by posting such notice of change in control on the exchange facilitator's website, if any, for a period ending not sooner than 90 days after the change in control. Such notification shall set forth the name, address, and other contact information of the transferees. For purposes of this chapter, "transferee" means the party or parties to whom the ownership or control of the exchange facilitator has been transferred. Notwithstanding the above, if the exchange facilitator is a publicly traded company and remains a publicly traded company after a change in control, the publicly traded company shall not be required to notify its existing clients of such change in control. For purposes of this section, "change in control" means any transfer within 12 months of more than 50 percent of the assets or ownership interests, direct or indirect, of the exchange facilitator.

§ 55-525.3. Separately identified accounts, or qualified escrows or qualified trusts.

A. An exchange facilitator at all times shall:

1. Deposit the exchange funds in a deposit account that is a separately identified account, as defined in Treasury Regulation § 1.468B-6(c)(ii), and provide that any withdrawals from such separately identified account require the written authorization of the exchange client and written acknowledgment of the exchange facilitator. Authorization for withdrawals may be delivered by any commercially reasonable means, including (i) the exchange client's delivery to the exchange facilitator of the exchange client's authorization to disburse exchange funds and the exchange facilitator's delivery to the financial institution of the exchange facilitator's authorization to disburse exchange funds or (ii) delivery to the financial institution of both the exchange client's and the exchange facilitator's authorizations to disburse exchange funds. For purposes of this chapter, a "deposit account" means a demand, time, savings, passbook, money market, certificate of deposit, or similar account maintained with a financial institution; or

2. Deposit the exchange funds in a deposit account that is a qualified escrow or qualified trust as those terms are defined under Treasury Regulation § 1.1031(k)-1(g)(3).

B. The deposit account shall be with a financial institution and the interest earned on such account shall accrue to the parties as provided in a written agreement between the exchange facilitator and the exchange client. However, the exchange client may expressly direct the exchange facilitator in writing to invest the exchange proceeds in an investment of the exchange client's choice, provided that the exchange facilitator provides written acknowledgment back to the exchange client that includes a confirmation of how the exchange proceeds will be invested.

§ 55-525.4. Errors and omissions insurance; cash or letters of credit.

A. An exchange facilitator at all times shall:

1. Maintain a policy of errors and omissions insurance in an amount not less than \$250,000 executed by an insurer authorized to do business in the Commonwealth; or

2. Deposit an amount of cash or provide irrevocable letters of credit equivalent to the sum of not less than \$250,000.

B. The exchange facilitator may maintain errors and omissions insurance, cash, or irrevocable letters of credit in excess of the amounts required in this section.

§ 55-525.5. Accounting for moneys and property.

A. Every exchange facilitator shall hold all property related to the exchange client including the exchange funds, other property, and other consideration or instruments received by the exchange facilitator, on behalf of the client, except funds received as the exchange facilitator's compensation. Exchange funds shall be held in accordance with the requirements of § 55-525.3.

B. An exchange facilitator shall not:

1. Commingle exchange funds with the operating accounts of the exchange facilitator; or

2. Lend or otherwise transfer exchange funds to any person or entity affiliated with or related (as described in Internal Revenue Code § 267(b) or 707(b)) to the exchange facilitator except that this subsection shall not apply to a transfer or loan made to a financial institution that is the parent of or related to the exchange facilitator or to a transfer from an exchange facilitator to an EAT as required under the exchange contract.

C. Exchange funds are not subject to execution or attachment on any claim against the exchange facilitator. An exchange facilitator shall not keep or cause to be kept any money in any financial institution under any name designating the money as belonging to an exchange client of the exchange facilitator unless the money equitably belongs to the exchange client and was actually entrusted to the

exchange facilitator by the exchange client.

§ 55-525.6. Prohibited acts.

A. A person who engages in the business of an exchange facilitator is prohibited from:

- 1. Making any material misrepresentations concerning any exchange facilitator transaction that are intended to mislead another;*
- 2. Pursuing a continued course of misrepresentation or making false statements through advertising or otherwise;*
- 3. Failing, within a reasonable time, to account for any moneys or property belonging to others that may be in the possession or under the control of the exchange facilitator;*
- 4. Engaging in any conduct constituting fraudulent or dishonest dealings;*
- 5. Committing any crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or other theft of property;*
- 6. Materially failing to fulfill its contractual duties to the exchange client to deliver property or funds to the exchange client unless such failure is due to circumstances beyond the control of the exchange facilitator; or*
- 7. Materially violating any of the provisions of this chapter.*

B. A person who is an owner, officer, director, or employee of an exchange facilitator is prohibited from committing any crime involving fraud, misrepresentation, deceit, embezzlement, misappropriation of funds, robbery, or other theft of property; however, the commission of such crime by an officer, director, or employee of an exchange facilitator shall not be considered a violation of this chapter if the employment or appointment of such officer, director, or employee has been terminated and no clients of the exchange facilitator were harmed or full restitution has been made to all harmed clients within a reasonable period of time.

§ 55-525.7. Penalty; attorney fees.

A. In any action brought under this chapter, if a court finds that a person has willfully engaged in an act or practice in violation of this chapter, the Attorney General, the attorney for the Commonwealth, or the attorney for the locality may recover for the Literary Fund, upon petition to the court, a civil penalty of not more than \$2,500 per violation. For purposes of this section, prima facie evidence of a willful violation may be shown when the Attorney General, the attorney for the Commonwealth, or the attorney for the locality notifies the alleged violator by certified mail that an act or practice is a violation of this chapter and the alleged violator, after receipt of the notice, continues to engage in the act or practice.

B. In any action brought under this chapter, the Attorney General, the attorney for the Commonwealth, or the attorney for the county, city, or town may recover costs and reasonable expenses incurred by the state or local agency in investigating and preparing the case, and attorney fees.